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No. 71-116

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANK JOSEPH CARACCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1971. A petition for a writ of certiorari was filed on July 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established entrapment as a matter of law.

2. Whether petitioner was afforded a fair trial by an impartial jury.

3. Whether petitioner was deprived of his final summation.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana,[1] petitioner was convicted of paying unlawful bribes and gratuities to an Internal Revenue Service agent, in violation of 18 U.S.C. 201(b) and (f), and of conspiring to pay unlawful bribes and gratuities in violation of 18 U.S.C. 371. He received concurrent prison sentences of one year imprisonment and was fined $10,000. The court of appeals affirmed (Pet. App. A).

The facts are set forth in the opinion of the court of appeals. In November of 1968, Internal Revenue Service Agent Moline began a routine audit of petitioner's 1965, 1966, and 1967 income tax returns (Tr. 100-102, 157).[2] On February 7, 1969, agent Moline received a telephone call from petitioner's stockbroker, John Quincy Adams, in which Adams said that he wished to discuss a matter with the agent

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[1] After the jury was sworn co-defendant John Quincy Adams pleaded guilty, and the case of co-defendant Robert Vaucresson was severed.

[2] We are lodging with the Clerk a copy of the transcript of trial ("Tr.").

which could not be discussed over the telephone (Tr. 102). The next day the agent telephoned Adams. During the course of the conversation Adams asked the agent if he could "do something" for petitioner (Tr. 104). Suspicions aroused, the agent immediately contacted his Regional Inspector and informed him of the telephone conversations. On February 10, Adams again telephoned agent Moline and said, "You know this matter I talked with you about Saturday could be more interesting than I thought" (Tr. 104-106).

Internal Revenue Service Inspector Fonville arrived in New Orleans on February 11 to supervise further investigation of the attempted bribery of Moline (Tr. 651-653). Agent Moline was instructed that under no circumstances could he do or say anything that would cause anyone to offer a bribe to him, but once a definite overture had been made, he could acquiesce and accept whatever was offered him (Tr. 654, 657, 668-669, 747-748, 769, 771).

Beginning on February 12, Moline had numerous telephone conversations and meetings with Adams relative to the agent's "eas[ing] up or get[ting] out," of petitioner's tax examination (Tr. 110-111 113, 116-117, 118-119, 123-124). On February 26, during the course of the conversations, Adams telephoned Agent Moline and told him that one "Sonny" Vaucresson was "in on the deal" and that Vaucresson was going to act as an intermediary between the agent and petitioner (Tr. 130-133).

On March 3, Moline met petitioner at his place of business. Petitioner, apparently fearing electronic

eavesdropping, produced a pad and pencil and wrote "[w]hat will you do for me for a moderate sum." (Tr. 147-148). Written negotiations concerning the bribery were passed back and forth until it was finally agreed that petitioner would pay the agent $2,500 shortly and $5,000 more after petitioner received a "no change letter" from the Internal Revenue Service indicating that his tax audit revealed no additional tax liability (Tr. 158, 177). The notes evidencing the bribe offer were destroyed at the end of the conversation (Tr. 150).

On March 10, Agent Moline again met petitioner at his place of business (Tr. 161-162). After some negotiations, petitioner gave the agent $2,500 in cash in return for the agent's written receipt (Tr. 165-166, 176).

On April 1, Inspector Fonville mailed a "no change letter" to petitioner (Tr. 179, 682, 740-742). On April 7, Agent Moline spoke with petitioner and was told that petitioner had received the "no change letter" (Tr. 180). On April 9, Agent Moline met petitioner at his place of business (Tr. 186) and, after both oral and written communications, petitioner gave the agent $6,000—$5,000 for the agent and $1,000 to be divided equally between Vaucresson and Adams (Tr. 187). Petitioner and his co-defendants were arrested on April 14 after Vaucresson and Adams received $500 each from Agent Moline as payment for their participation in the scheme (Tr. 194-197, 234, 694, 928).

ARGUMENT

1. The court of appeals correctly held that petitioner was not entrapped as a matter of law (Pet. App. 6a-8a). The evidence showed that Agent Moline merely acquiesced to overtures made by Adams and petitioner. There was no proof that Moline had implanted the idea to commit the crime in Adams' or petitioner's minds. Rather petitioner, through Adams, initiated the offer to settle his tax deficiencies by other than lawful means, and thereafter continued in this course of conduct without prodding from the agent. The evidence falls far short of entrapment. *Osborn* v. *United States*, 385 U.S. 323, 331-332; *Sherman* v. *United States*, 356 U.S. 369, 372; *Sorrells* v. *United States*, 287 U.S. 435, 441-442. Resolution of this question was therefore properly left to the jury.[3] See *United States* v. *Henry*, 417 F. 2d 267, 269-270 (C.A. 2).

2. Petitioner argues that he was deprived of a jury of his own choice because he had to share his peremptory challenges with co-defendants who ultimately were not tried with him (see *supra*, note 1). This issue was not presented in the court of appeals and need not be reviewed at this juncture. In any event, the claim is without merit. It is well settled that defendants charged with a non-capital offense,

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[3] Petitioner's claim that the court's instructions to the jury on the issue of entrapment were erroneous is similarly without merit. As the court of appeals noted (Pet. App. 7a), the charge was synthesized almost verbatim from the opinions of *Sorrells*, *supra*, and *Sherman*, *supra*, and was both full and fair.

whether tried singly or jointly, are entitled to no more than ten peremptory challenges as a matter of right. Rule 24(b), Fed. R. Crim. P.; *United States* v. *Gleeson*, 411 F. 2d 1091, 1095 (C.A. 10); *United States* v. *Crutcher*, 405 F. 2d 239, 245 (C.A. 2), certiorari denied, 394 U.S. 908; *Gradsky* v. *United States*, 342 F. 2d 147 (C.A. 5), certiorari denied, 382 U.S. 846; see *Stilson* v. *United States*, 250 U.S. 583. At the time the jury was empaneled both Vaucresson and Adams were parties to the suit and entitled to exercise their peremptory challenges. The jury as constituted was accepted by all counsel (Tr. 3-4). The subsequent severance of Vaucresson's[4] case and the acceptance of Adams' plea of guilty[5] did not entitle petitioner to additional challenges. *United States* v. *Macke*, 159 F. 2d 673, 674-675 (C.A. 2), certiorari denied, 331 U.S. 810; see also *Jackson* v. *United States*, 408 F. 2d 306, 308-309 (C.A. 9); *Hanson* v. *United States*, 271 F. 2d 791, 793 (C.A. 9).

Petitioner's claim that the court prejudiced the jury by informing them that Adams had pleaded guilty is similarly baseless. In light of the court's cautionary instructions that Adams' guilty plea not be considered as bearing on petitioner's guilt (Tr.

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[4] Vaucresson was granted a severance after a colloquy between defense counsel and the court revealed the likelihood that Vaucresson's defense would be antagonistic to that of petitioner.

[5] Contrary to petitioner's assertion, the record shows that although prior discussion had occurred between Adams' counsel and the prosecutor, it was not known until the time of the plea that Adams would plead guilty (Tr. 29-33).

74-75), it was not error for the court to inform the jury of the reason for Adams' absence. *United States* v. *Mingoia*, 424 F. 2d 710, 714 (C.A. 2); *Koolish* v. *United States*, 340 F. 2d 513 (C.A. 8), certiorari denied, 381 U.S. 951; *United States* v. *Dardi*, 330 F. 2d 316, 333 (C.A. 2), certiorari denied, 379 U.S. 845.

Petitioner also contends (Pet. 16-20) that the trial judge abused his discretion in denying petitioner's motion for a continuance following Adams' plea of guilty and the grant of a severance to Vaucresson. The severance and plea of guilty occurred the day before the government's opening statement and the introduction of any evidence. The court recessed in the afternoon on Monday, February 16, 1969, and did not reconvene until the following day at 10:00 a.m. (Tr. 39-45). The trial judge did not abuse his discretion in concluding in these circumstances that petitioner had had sufficient time in which to adjust his defense.

3. As the court of appeals noted (Pet. App. 8a), the trial court acted within its permissible discretion by informing defense counsel they were not to offer repetitious arguments in summation (Tr. 1018, 1059). The court's interruption of defense counsel at one point with the comment "we are really getting repetitious on that * * *, let's go on to some new point" (Tr. 1059) did not deprive petitioner of a final summation. *Davis* v. *United States*, 409 F. 2d 1095, 1101 (C.A. 5). The record shows that defense counsel was not interrupted again, nor in any way limited in his closing argument.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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